

October 18, 1999

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)
)
PRIVATE FUEL STORAGE L.L.C.) Docket No. 72-22-ISFSI
)
(Private Fuel Storage Facility))

**APPLICANT'S RESPONSE TO STATE OF UTAH'S REQUEST FOR
ADMISSION OF LATE-FILED AMENDED UTAH CONTENTION V**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the "State of Utah's Request for Admission of Late-Filed Amended Utah Contention V," filed October 4, 1999 ("State's Request"). The amended contention alleges that PFS neglects to consider the impacts of converging many spent fuel shipments on the Wasatch Front region, as well as failing to consider the Wasatch Front impacts cumulatively with those of high population areas in Nevada. The State's Request should be denied as untimely, both as a motion for reconsideration and as a motion to admit a late-filed contention.

I. BACKGROUND

Utah Convention V, filed as one of the State's original contentions, challenged the adequacy of PFS's consideration of the transportation-related environmental impacts of the Private Fuel Storage Facility ("PFSF") in its Environmental Report. See "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility" ("State's Contention V").

tions”), at 144-161 (November 23, 1997). The contention encompassed numerous specific transportation-related allegations:

1. Table S-4 is inappropriate because
 - it is inapplicable to independent spent fuel storage installations
 - PFS does not satisfy Table S-4’s conditions as to enrichment, burnup, cask weight, numbers of shipments, and alleged backup at the Inter-modal Transfer Point (“ITP”)
2. PFS’s Safety Analysis Report is inadequate to supplement Table S-4 with respect to
 - handling of casks at the ITP
 - return of substandard or degraded casks to reactors
 - reactors without railroad access
3. Table S-4 is out-of-date because it
 - relies on a 1972 document (WASH-1238)
 - does not include new information on sabotage, human error, maximum credible accidents, fuel cladding degradation, accident consequences, consequences of a railroad accident in Salt Lake City, criticality, RADTRAN dose calculation model, and transportation distances.

Id. The text of the original Contention V was restated in full by the Board in Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 199-201 (1998). See Attachment 1. Nothing in this contention referred to or mentioned the issues raised in Amended Contention V, i.e. Wasatch Front convergence and cumulative impacts in Nevada. The Board admitted only that portion of the contention dealing with shipping cask weight,

Admissible as to paragraph two and its supporting basis as it alleges that the weight for a loaded PFS shipping cask is

outside the parameters of 10 C.F.R. § 51.52 (Summary Table S-4).

Id. at 201. The Board rejected all other aspects of the original contention, stating that the contention and its bases were:

Inadmissible as to paragraph one, the balance of the assertions in paragraph two, and paragraphs three and four and their supporting bases, which fail to establish with specificity any genuine dispute; impermissibly challenge the applicable Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. §§ 51.52, 72.108, and "Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants," WASH-1238 (Dec. 1972), as supplemented, NUREG-75/038 (Supp. 1 Apr. 1975); lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application.

Id. at 200-201 (footnote and citation omitted).

The State did raise the issue of cumulative transportation impacts in its original Contention Y, "Connected Actions." In Contention Y, the State asserted that

The Applicant fails to adequately discuss the link between this proposal and the national high level waste program, a connected action, as is required under NEPA.

State's Contentions at 167 (footnote omitted), see also LBP-98-7, supra, 47 NRC at 202.

As part of the bases supporting this contention, the State asserted that the PFSF

adds significant cumulative impacts caused by transporting spent fuel across the country to Utah and then moving the fuel to wherever a final repository will be located. These impacts could be avoided by leaving the fuel onsite until a repository is ready.

State's Contentions at 168. The Board rejected this contention in full stating that it is

Inadmissible in that this contention and its supporting basis fail to establish with specificity any genuine dispute;

impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. §§ 51.23, 51.61; and/or lack adequate factual or expert opinion support.

LBP-98-7, supra, 47 NRC at 202 (citation omitted).

On October 4, 1999, the State filed a request to the Licensing Board that "seeks the admission of late-filed Amended Contention V" and that "seeks reconsideration of a 1998 ruling in which the Licensing Board denied admission of the issue of the adequacy of Table S-4 of 10 C.F.R. Part 51, as relied on by the Applicant in its Environmental Report ("ER"), to support the evaluation of the regional impacts of spent fuel transportation, including the impacts of a severe accident in Salt Lake City." State's Request at 1. The State seeks reconsideration of the 1998 ruling "in light of [the] recent determinations by the Commission in NUREG-1437, Addendum 1, Generic Environmental Impact Statement for License Renewal of Nuclear Plants at 3, A1-8 (August 1999) ("Final GEIS")." State's Request at 1-2. The text of the State's proposed Amended Contention V reads as follows:

The ER for the PFS facility fails to give adequate consideration to the transportation-related environmental impacts of the proposed independent spent fuel storage installation ("ISFSI") in that it relies on Table S-4, which neglects to consider the impacts of converging many spent fuel shipments on the Wasatch Front region, including the impact of a severe and foreseeable accident on Salt Lake City and its environments, and including economic as well as physical impacts. Therefore, the ER is inadequate to satisfy 10 C.F.R. § 72.108. The impacts on the Wasatch Front must also be considered cumulatively with the impacts on high population areas in Nevada, such as Las Vegas.

State's Request at 2.

II. ARGUMENT

The State's late-filed Amended Contention V should not be admitted, first, because the deadline for reconsideration has long since passed, and second, because it does not satisfy the NRC's requirements for late-filed contentions.

A. The Time to Request Reconsideration Has Passed

The time to file a motion for reconsideration of the Board's rulings in LBP-98-7 has long since expired. The Board originally established a deadline of May 4, 1998 for filing motions for reconsideration with respect to LBP-98-7, supra, 47 NRC at 249. At the NRC Staff's request, the Board granted an extension for filing motions for reconsideration to May 6, 1998. Order (Granting Motions to Extend Time for Filing Reconsideration Motions and Joint Status Report and to Exceed Page Limitations) at 2 (May 1, 1998). In fact, the State did seek reconsideration with respect to several contentions, but failed to do so with respect to either Contentions V or Y. See "State of Utah's Motion for Clarification and Reconsideration of LBP-98-7" at 6-20 (May 6, 1998). Since the time to file for reconsideration of the Board's rulings in LBP-98-7 has long passed, the State's request for reconsideration must be denied.

B. The State's Request to File Amended Contention V Is Unjustifiably Late

The State must demonstrate that a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) supports admission of its late-filed contention. LBP-98-7, supra, 47 NRC at 167, 207-09. The State has failed to do so and its request for the admission of late-filed Amended Convention V must be denied.

1. The State Lacks Good Cause

The first and most important factor in determining the admissibility of a late-filed contention is a showing of good cause. The State lacks good cause here because the bases for its late-filed amended contention have been available to the State since the beginning of this proceeding and obviously for much longer than the period required by the Board for timely filing.¹ The State could have raised the issue of Wasatch Front convergence² and in fact did raise the issue of cumulative impacts with the repository in its November 1997 filing of the original Contention Y.

The crux of Amended Contention V is that PFS's Environmental Report did not consider the impacts of spent fuel shipments to the PFSF converging on the Wasatch Front Region, the impacts of a severe accident on Salt Lake City, and the impacts on the Wasatch Front cumulated with the impacts on high populations areas in Nevada.

¹ See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) LBP-99-3, 49 NRC 40, 47 (1999) (stating the 45 days approaches the outer boundary for timeliness).

² In its original Contention V, the State did try to raise a "convergence" issue, but only with respect to Rowley Junction. The State asserted in Contention V that:

In an apparent effort to supplement Table S-4, the SAR contains an analysis of the impacts of fuel transfer at Rowley Junction. Assuming that Table S-4 even applies, this analysis is inadequate in several respects. First, PFS assumes that there will be one cask on the Rowley Junction site every day. ER at 4.7-5. This assumption is unreasonable. As discussed in Contention B, given the high volume of rail shipments involved, it is likely that bottlenecks will form at Rowley Junction, and therefore it is likely that more than one cask will be stored onsite at any given time. PFS has failed to evaluate the potential for bottlenecks and their impacts with respect to incident-free handling and accidents.

State's Contentions at 149-150. This aspect of the contention (both in B and V) was ruled as inadmissible by the Board since it "impermissibly challenge[s] the Commission's regulations or rulemaking-associated generic determinations, including the provisions of 10 C.F.R. Part 71 governing transportation of spent fuel from reactor sites to the PFS facility," LBP-98-7, supra, 47 NRC at 184, and "relies on rail shipment volume, a consideration we consider insufficient to support the admission of Utah B or this contention," id. at 201 n.23.

To the extent that Utah treats this as a new issue,³ it simply has supplied no grounds for good cause. The Wasatch Front convergence issue is not based upon new information. It was certainly no secret at the time that Utah filed its original contentions that spent fuel would come to the Skull Valley site from east coast reactors by rail. There have been no new rail lines built through Utah since 1997. If there is to be a “convergence” of spent fuel shipments, Utah knew or should have known of that possibility in 1997.

The State argues that the Commission’s recent statement that a site-specific study of cumulative transportation impacts will be included in the draft environmental impact statement for the PFSF, somehow creates good cause for its late-filed amended contention. State’s Request at 11. See Final Rule, Changes to Requirements for Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 64 Fed. Reg. 48,496, 48,501 (Sept. 3, 1999). The simple fact is that this statement provides no basis for a new or an amended contention. The issue of Wasatch Front convergence was not created as a result of the Commission’s statement, nor does the Commission’s statement provide a basis for such contention. If there were a basis for such a contention, it was there in November 1997.

The original Contention V did claim that Table S-4 was inadequate because “it fails to estimate the consequences of a severe rail accident in Salt Lake City, a high

³ If it is considered part of the original Contention V, then Utah’s complaint goes to the Board’s 1998 decision in LBP-98-7 and, as set forth above, Utah’s attempt to reconsider that decision is grossly out of time. As also noted above, the Wasatch Front convergence and cumulative impacts in Nevada issues were never mentioned in connection with the original Contention V. However, the cumulative impacts issue was included in the original Contention Y, “Connected Actions.”

population area.” State’s Contentions at 159. The Board rightly rejected this part of the original Contention V. In any case, the issue of a major rail accident happening in Salt Lake City is hardly a new one and the State has provided no basis for raising it – again – at this late date.⁴

The original Contention Y did claim that PFS failed to adequately discuss the link between the PFSF and the repository, providing as part of its basis that PFSF “adds significant cumulative impacts caused by transporting spent fuel across the country to Utah and then moving the fuel to wherever a final repository will be located.” State’s Contentions at 167, 168. The Board rightly rejected Contention Y. Among other things, such a claim challenges the NRC generic determination in 10 C.F.R. §§ 51.23 and 51.61 that “no discussion of the environmental impact of the storage of spent fuel at an ISFSI beyond the term of the license or amendment applied for is required in an environmental report submitted by an applicant for an initial license for storage of spent fuel in an ISFSI, or any amendment thereto.” 10 C.F.R. § 51.61. Nonetheless, as with the other aspects of the State’s Amended Contention V, there is nothing new set forth by the State to justify its extreme lateness.⁵

⁴ Wholly apart from being untimely and seeking to re-raise issues that the Board already rejected, this issue is no more than a frontal attack on Table S-4 and should be rejected as such. See 10 C.F.R. § 2.758.

⁵ Apart from its lateness, the last aspect of the State’s Amended Contention V specifically requests that “[t]he impacts on the Wasatch Front must also be considered cumulatively with the impacts on high population areas in Nevada, such as Las Vegas.” See State’s Request at 2. 10 C.F.R. § 72.108 requires the applicant to evaluate the potential environmental impacts of transportation of spent fuel “within the region” of the proposed ISFSI. “[H]igh population areas in Nevada, such as Las Vegas” clearly do not fall within the regional aspect of 10 C.F.R. § 72.108. There is clearly no nexus between the transportation impacts associated with PFSF and those associated with the permanent repository. Hence this contention must be dismissed.

Nor does the State's supposedly diligent pursuit of this issue through other means somehow justify its failure to file a timely and acceptable contention. As the Commission has clearly determined, intervenors cannot simply wait to file a contention when the information supporting the contention has previously been publicly available.⁶ No new information relevant to this proceeding has been presented by the Commission in its rulemaking on the license renewal GEIS. The State has an "ironclad obligation to examine [on a timely basis] the publicly available documentary material"⁷ Here, the information supporting the contention was not only publicly available, but has been explicitly discussed for many months by the State and its expert. Its failure to fulfill this obligation cannot justify the admission of an untimely contention.

The State therefore lacks good cause. Where good cause is lacking, a compelling showing must be made on the other four factors, which the State has not done here.

2. The Other Factors Do Not Justify Admission of the Late-Filed Contention

Nor do the remaining four factors form the compelling case needed to overcome the State's total lack of good cause. While the State's interests may not be represented by another party in the PFS proceeding, it certainly has other means available to protect its interests, for example, by commenting on the draft Environmental Impact Statement that will be published for public review and comment, and which will, as specifically stated by the Commission, address the issues of convergence and cumulative impacts. 64 Fed. Reg. at 48,501.

⁶ See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983).

⁷ Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-8A, 17 NRC 282, 285 (1983).

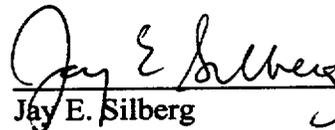
And, even putting aside the expertise that the State claims for Dr. Resnikoff, admission of the contention will certainly broaden and inevitably delay this proceeding by expanding its scope to include a contention that has already been narrowed and a contention that has already been dismissed by the Board.

In sum, the remaining four factors weighed together militate against granting the State's late-filed motion, and therefore clearly do not make the compelling showing required to overcome the State's lack of good cause. LBP-98-7, supra, 47 NRC at 208 (citing Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986)).

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board deny Utah's request to admit its late-filed Amended Contention V.

Respectfully submitted,



Jay E. Silberg

Ernest L. Blake, Jr.

Paul A. Gaukler

SHAW PITTMAN

2300 N Street, N.W.

Washington, DC 20037

(202) 663-8000

Counsel for Private Fuel Storage L.L.C.

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